Supreme Court U.S.
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No. 02-449

IN THE

Supreme Court of the United States

HOLIDAY QUALITY FOODS, INC.,

Petitioner,

v.

JERRY DORAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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I. SUMMARY OF ARGUMENT

This Court should deny the petition for writ of certiorari. The Petitioner's "questions presented for review" rely upon a faulty understanding of the Ninth Circuit's holding. The Petitioner characterizes the Ninth Circuit as holding that standing could exist "*even in the absence of concrete and particularized injury in fact.*" But the Ninth Circuit did not issue this holding. The Ninth Circuit held that a plaintiff must show concrete and particularized injury: "*In the context of the ADA, we understand that to mean that Doran must himself suffer an injury as a result of the Paradise store's noncompliance with the ADA.*"

The Petitioner then characterized the Ninth Circuit as holding that "*a plaintiff's claims under the ADA are not barred by the statute of limitations even though the claim is based on acts known to have occurred far outside the limitations period.*" But the Ninth Circuit did not issue this holding. The Ninth Circuit actually held that:

> *A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period. [Footnote omitted.] But he or she has a cause of action, and is entitled to injunctive relief, for an injury that is occurring within the limitations period, as well as for threatened future injury.*

In other words, the Petitioner has not raised a ripe issue for review. The Petitioner has made the mistake known as the "straw-man" fallacy by attributing a false position to the Ninth Circuit and then urging this Court to review such position.

II. LEGAL ARGUMENT: THIS COURT SHOULD DENY THE WRIT OF CERTIORARI

This Court should deny certiorari because the petitioner has failed to present a question that is properly subject to judicial review. It is fundamental constitutional law that the parties, no matter how eager, cannot compel a court to decide a hypothetical question when no case or controversy exists. The principle applies to both problems of ripeness and mootness. *Regional Railroad Reorganization Act Cases*, 419 U.S. 102, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974) (questions not ripe for review fail to present the Court with a case or controversy); *Kremens v. Bartley*, 431 U.S. 119, 52 L. Ed. 2d 184, 97 S. Ct. 1709 (1977) (moot questions fail to present the Court with a case or controversy).

Because the Ninth Circuit has not issued the ruling Petitioner claims has been issued, Petitioner's questions presented are hypothetical and therefore not ripe for review. The Petitioner has engaged in the illegitimate rhetorical device known as the straw-man fallacy because it attributes false holdings to the Ninth Circuit and then attacks those holdings. Respondent addresses each of Petitioner's questions presented in turn.

A. PETITIONER'S FIRST QUESTION PRESENTED MISSTATES THE NINTH CIRCUIT'S HOLDING IN THE CASE BELOW AND THUS THERE IS NO GENUINE QUESTION FOR THIS COURT TO DECIDE.

Petitioner' first "question for review" demonstrates a fundamental misunderstanding of the Ninth Circuit's ruling in the case below. Specifically, in its first "question for

review," Petitioner states that the Ninth Circuit held that standing could exist "*even in the absence of concrete and particularized injury in fact.*" (Petition, p. "i"). This holding **would be** a remarkable departure from long standing precedence and **would be** a proper holding for review by this Court. *See Lujan v. Defenders if Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (doctrine of standing is a hallmark of cases or controversies which may be resolved through judicial process).

But the Ninth Circuit did ***not*** issue that ruling. In fact, the Ninth Circuit cited *Lujan* as binding authority, agreed with *Lujan's* holding, and affirmed its belief that a plaintiff must show concrete and particularized injury in order to maintain a viable case. The Ninth Circuit's ruling reads in pertinent part:

> In the context of the ADA, we understand that to mean that Doran must himself suffer an injury as a result of the Paradise store's noncompliance with the ADA. We hold that in stating that he is currently deterred from attempting to gain access to the Paradise store, Doran has stated sufficient facts to show concrete, particularized injury.

Pickern v. Holiday Quality Foods, Inc., 293 F.3d 1133, 1137-38 (2002).

Thus, contrary to Petitioner's assertion, the Ninth Circuit did ***not*** hold that a plaintiff who has ***not*** suffered concrete and particularized injury nonetheless has standing to bring suit. The Petitioner mischaracterized the Ninth Circuit's holding and the Petitioner's argument should be rejected.

In another improper treatment of the Ninth Circuit's holding, the Petitioner sets up his straw-man argument by quoting the Ninth Circuit out of context. The Petitioner cites the Ninth Circuit thusly:

> *When . . . a plaintiff seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief . . . by lack of standing.*

(App. at 3a) (Petition, p.7). This "quote" attempts to attribute a holding to the Ninth Circuit that it did not make. First, the actual quote, in its entirety, is as follows:

> We hold that when a plaintiff who is disabled within the meaning of the ADA has actual knowledge of illegal barriers at a public accommodation to which he or she desires access, that plaintiff need not engage in the "futile gesture" of attempting to gain access in order to show actual injury during the limitations period. When such a plaintiff seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief either by the statute of limitations or by lack of standing.

Pickern, 293 F.3d at 1135. The Ninth Circuit further clarified its holding in the body of its opinion by stating:

> In addition to suffering a concrete injury particular to himself, Doran must also have suffered actual or imminent injury. We hold that a disabled individual who is **currently deterred** from patronizing a public accommodation due to a defendant's failure to comply with the ADA has

> suffered "actual injury." Similarly, a plaintiff who is threatened with harm in the future **because of existing** or imminently threatened non-compliance with the ADA suffers "imminent injury."
>
> Doran has visited Holiday's Paradise store in the past and states that **he has actual knowledge of the barriers** to access at that store. Doran also states that he prefers to shop at Holiday markets and that **he would shop at the Paradise market if it were accessible**. This is sufficient to establish actual or imminent injury for purposes of standing.

Pickern, 293 F.3d at 1138 (emphasis added).

Thus, the Ninth Circuit did not hold that a plaintiff "need not show standing" in order to maintain a lawsuit under the ADA. To the contrary, the Ninth Circuit merely held that a plaintiff who (1) has actual knowledge of the barriers to access, (2) wants to patronize the store, and (3) is deterred because of those barriers, **has established** injury and standing.

The Ninth Circuit broadly held that plaintiffs seeking injunctive relief from ongoing violations of the ADA have standing because such plaintiffs have suffered both actual and imminent harm:

> We hold that a disabled individual who is currently deterred from patronizing a public accommodation due to defendant's failure to comply with the ADA has suffered "***actual harm***."

> Similarly, a plaintiff who is threatened with harm in the future because of an existing or imminently threatened non-compliance with the ADA suffers "***imminent harm***."

Id. (emphasis added).The Ninth Circuit also narrowly held that Respondent is specifically such a plaintiff who suffers actual and imminent harm through Petitioner's putatively illegal conduct:

> We hold that in stating that he [Respondent] is currently deterred from attempting to gain access to the Paradise store, [Respondent] Doran has stated sufficient facts to show concrete particularized harm.

Id. Because the Ninth Circuit held that Respondent has suffered an injury in fact, which is personal, distinct and palpable, the exercise of federal jurisdiction in this matter was consistent with Article III's limitation. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 – 100, 60 L. Ed. 2d 66, 99 S. Ct. 1601 (1979) (Article III's standing requirement is satisfied upon a plaintiff's showing that he has suffered actual or imminent harm at defendant's hand); *accord Lujan, supra*, at 560; *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000). Thus, contrary to Petitioner's assertion, the Ninth Circuit's ruling in the case below is consistent with the long-standing principle that a plaintiff must have standing in order to present the court with a viable case or controversy for resolution.

Petitioner's first question presented — whether the Ninth Circuit erred in holding that a plaintiff has standing to sue

under the ADA even in the absence of an injury in fact — is not properly before this Court as the Ninth Circuit has made no such ruling. The Ninth Circuit has ***not*** ruled that a lack of standing, stemming from an absence of injury in fact, is no barrier to federal jurisdiction and thus the question of whether such a ruling would be an error is not ripe for review.

Petitioner failed to present an issue that is ripe for review because Petitioner's "concern" is based on a misunderstanding of the Ninth Circuit's ruling. Petitioner has failed to frame its first question presented such that this Court could properly review the issue.

B. PETITIONERS SECOND QUESTION PRESENTED MISSTATES THE NINTH CIRCUIT'S HOLDING IN THE CASE BELOW AND THUS THE ISSUE IS NOT RIPE FOR REVIEW.

Petitioner's second question presented further demonstrates Petitioner's fundamental misunderstanding of the Ninth Circuit's ruling in the case below and likewise fails to properly frame a question that might be resolved by a Writ of Certiorari. Specifically, in framing its second "question for review," the Petitioner characterizes the Ninth Circuit's holding as "a plaintiff's claims under the ADA are not barred by the statute of limitations even though the claim is based on acts known to have occurred far outside the limitations period." (Petition, p. "i"). **If this were** the holding of the Ninth Circuit, it might be considered a wholesale abandonment of the statute of limitations period.

This was not the holding of the Ninth Circuit. Here again, the Ninth Circuit did ***not*** issue a ruling that flies in the face of such a fundamental premise of American jurisprudence.

See Wilson v. Garcia, 471 U.S. 261, 266-67, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985) (illustrating the Court's long-standing recognition of important policies underlying statutes of limitations). The Ninth Circuit's ruling reads in pertinent part:

> A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period. [Footnote omitted.] But he or she has a cause of action, and is entitled to injunctive relief, for an injury that is occurring within the limitations period, as well as for threatened future injury.

Pickern, 293 F.3d at 1137.

Thus, contrary to Petitioner's suggestion, the Ninth Circuit did ***not*** hold that a plaintiff who files a complaint after the statute of limitations expires nonetheless has a viable case or controversy. Quite the opposite, the Ninth Circuit plainly stated, "A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period." *Id.* The Ninth Circuit held that Respondent's claim was brought during the limitations period and stated: "[s]o long as the discriminatory conditions continue, and so long as a plaintiff is aware of them and remains deterred, the injury under the ADA continues."

The injury occurs at the time of deterrence. The defendant's discriminatory actions are ongoing as they continue to open their doors and invite the public but fail to remove segregating, discriminatory barriers to persons with disabilities. *See* 42 U.S.C. § 12182(b)(2)(A)(iv) (defining discrimination as the failure to remove architectural barriers).

Thus, Petitioner's second question presented — whether the Ninth Circuit erred in holding that a plaintiff is not barred by the statute of limitations even though the claim is based on acts known to have occurred far outside the limitations period — is not properly before this Court as the Ninth Circuit has made no such ruling. The Ninth Circuit has ***not*** ruled that claims brought after the limitations period expires are nonetheless valid and thus the question of whether such a ruling would be an error is not ripe for review.

Even assuming Petitioner's assertion that the Ninth Circuit had ruled that an expired limitations period is no bar to judicial review in this case — ***which the Ninth Circuit has not*** — the Ninth Circuit expressly stated that Respondent suffers from a continuing injury at the hands of Petitioner that prevented the foreclosure of the limitation period. In so doing, the Ninth Circuit correctly held that Respondent's claim is timely. Thus, even assuming the Ninth Circuit had ruled that foreclosure of the limitations period does not bar a valid claim under the ADA, the Ninth Circuit nevertheless found the limitations period in this case was still running and thus the question of whether the limitation period's expiration foreclosed Respondent's ability to file a valid claim in this case would be a moot question.

As such, not only has Petitioner failed to present an issue that is ripe for review, but, even when viewed in a light most favorable to Petitioner, Petitioner's second question presented is at best moot. Accordingly, Petitioner has failed to frame its second question presented such that this Court could properly review the issue.

III. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny certiorari in this case.

Respectfully submitted,

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